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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

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# No. 161

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ERNEST K. JAMES, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS ACTING TAX COMMISSIONER FOR THE STATE OF WEST VIRGINIA, *Appellant*,

*vs.*

UNITED ARTISTS CORPORATION.

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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA.

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## STATEMENT AS TO JURISDICTION.

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CLARENCE W. MEADOWS,
*Attorney General of West Virginia,*
W. HOLT WOODDELL,
*Assistant Attorney General,*
FORREST B. POLING,
*Assistant Attorney General,*
*Counsel for Appellant.*

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**STATEMENT ON BEHALF OF DEFENDANT AS TO JURISDICTION OF SUPREME COURT OF THE UNITED STATES TO REVIEW DECREE UPON APPEAL.**

(Filed May 21, 1938.)

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**In Equity.**

**No. 3624.**

UNITED ARTISTS CORPORATION, A CORPORATION,
*Plaintiff,*

*vs.*

ERNEST K. JAMES, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS ACTING TAX COMMISSIONER FOR THE STATE OF WEST VIRGINIA (SUCCESSOR TO FRED L. FOX, THE ORIGINAL DEFENDANT),
*Defendant.*

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Before Northcott, Circuit Judge, and McClintic and Harry E. Watkins, District Judges.

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, the defendant, Ernest K. James, individually and in his official capacity as Acting Tax Commissioner for the State of West Virginia (successor to Fred L. Fox, the original defendant), submits his statement disclosing the basis upon which he contends that the Supreme Court of the United States has jurisdiction upon appeal to review the judgment and decree in the above-entitled cause:

A.

**Statutory Provision Conferring Jurisdiction.**

The statutory jurisdiction of the Supreme Court to review by direct appeal the judgment and decree here complained of is conferred by Judicial Code, Section 238, amended (Act of February 13, 1925, Chapter 229, Section 1, 43 Stat. 938; 28 U. S. C. A., Sec. 345), which provides:

> "A direct review by the Supreme Court of an interlocutory or final judgment or decree of a district court may be had where it is so provided in the following sections and not otherwise:"
>
> * * * * * * *
>
> "(3) Section 380 of this title."

Section 380 of Title 28 U. S. C. A. (Judicial Code, Section 266, amended) referred to in the foregoing statute, reads (in part) as follows:

> "No interlocutory injunction suspending or restraining the enforcement, operation or execution of any statute of a state by restraining the action of any officer of such state in the enforcement or execution of such statute, or in the enforcement or execution of an order made by an administrative board or commission acting under and pursuant to the statutes of such state, shall be issued or granted by any justice of the Supreme Court, or by any District Court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, upon the ground of the unconstitutionality of such statute, unless the application for the same shall be presented to a justice of the Supreme Court of the United States, or to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a justice of the Supreme Court or a circuit judge, and the other two may be either circuit or district judges, and unless a majority

of said three judges shall concur in granting such application. * * * The requirement respecting the presence of three judges shall also apply to the final hearing in such suit in the district court; and a direct appeal to the Supreme Court may be taken from a final decree granting or denying a permanent injunction in such suit."

B.

**State Statute the Validity of Which is Involved.**

The statute of the State of West Virginia, the validity of which is involved, is Chapter 86, Acts of the Legislature of West Virginia, passed at the Regular Session of said Legislature of 1935, on March 9, 1935, in effect from passage, and published as Chapter 86 of the Official Acts of the West Virginia Legislature, Regular Session, 1935, pages 376-381, inclusive, and which said statute amended Section 2, Article 13, Chapter 11 of the Code of West Virginia, 1931, as amended by Section 2, Article 13, Chapter 33, Acts of the Legislature of West Virginia, First Extraordinary Session, 1933.

Said Chapter 33, Acts of the Legislature of West Virginia, First Extraordinary Session, 1933, so far as here material, reads as follows:

AN ACT to provide for the raising of additional public revenue by amending and re-enacting article thirteen, chapter eleven of the code of West Virginia, one thousand nine hundred thirty-one, relating to business and occupation taxes, by repealing all of sections one through seventeen, inclusive, and enacting and re-enacting sections one through twenty-three, inclusive; and providing for and imposing a privilege tax upon the exercise of certain privileges in the state, by repealing sections eighty-one through eighty-four, inclusive, article twelve, chapter eleven of said code; and enacting a new article to be designated article twelve-(a), chapter eleven of said code.

*Be it enacted by the Legislature of West Virginia:*

That sections one through seventeen, inclusive, article thirteen, chapter eleven of the code of West Virginia, one thousand nine hundred thirty-one, be and are hereby repealed and sections one through twenty-three, inclusive, be and are hereby enacted in lieu thereof; and that sections eighty-one through eighty-four, inclusive, article twelve, chapter eleven of said code be and are hereby repealed and article twelve-(a) be and is hereby enacted and added to chapter eleven.

SECTION 1. When used in this article, the term "person" or the term "company" herein used interchangeably, includes any individual, firm, copartnership, joint adventure, association, corporation, trust or any other group or combination acting as a unit, and the plural as well as the singular number, unless the intention to give a more limited meaning is disclosed by the context.

"Tax year" or "taxable year" means either the calendar year, or the taxpayer's fiscal year when permission is obtained from the tax commissioner to use same as the tax period in lieu of the calendar year.

"Sale" or "sales" includes the exchange of properties as well as the sale thereof for money, every closed transaction constituting a sale.

"Taxpayer" means any person liable for any tax hereunder.

"Gross income" means the gross receipts of the taxpayer received as compensation for personal services and the gross receipts of the taxpayer derived from trade, business, commerce or sales and the value proceeding or accruing from the sale of tangible property (real or personal), or service, or both, and all receipts by reason of the investment of the capital of the business engaged in; including interest, discount, rentals, royalties, fees or other emoluments however designated and without any deductions on account of the cost of property sold, the cost of materials used, labor costs, taxes, royalties, interest or discount paid or any other expense whatsoever.

"Business," as used in this article, shall include all activities engaged in or caused to be engaged in with the object of gain or economic benefit either direct or indirect. The production of raw materials or manufactured products, which are used or consumed in the main business, shall be deemed business engaged in taxable in the class in which it falls.

"Gross proceeds of sales" means the value actually proceeding from the sale of tangible property without any deduction on account of the cost of property sold or expenses of any kind. The words "gross income" and "gross proceeds of sales" shall not be construed to include cash discounts allowed and taken on sales; the proceeds of sale of goods, wares or merchandise returned by customers when the sale price is refunded either in cash or by credit; or the sale price of any article accepted as part payment on any new article sold, if the full sale price of the new article is included in the "gross income" or "gross proceeds of sales."

"Service business or calling" shall include all non-professional activities engaged in for other persons for a consideration, which involve the rendering of a service as distinguished from the production or sale of tangible property, but shall not include the services rendered by an employeee to his employer.

The classification of "wholesaler" or "jobber" shall apply only to a person doing a regularly organized jobbing business, known to the trade as such, selling to licensed retail merchants or jobbers, or to others in wholesale quantities and at wholesale prices.

Said Chapter 86, Acts of the Legislature of West Virginia, Regular Session, 1935, so far as here material, reads as follows:

AN ACT to amend section two, article thirteen, chapter eleven of the code of West Virginia, one thousand nine hundred thirty-one as amended by section two, article thirteen, chapter thirty-three, acts of the Legislature, first extraordinary session, one thousand

nine hundred thirty-three, and to amend said article thirteen by adding thereto sections two-(a) to two-(i), inclusive, relating to business, occupation and privilege taxes.

*Be it enacted by the Legislature of West Virginia:*

That section two, article thirteen, chapter eleven of the code of West Virginia, one thousand nine hundred thirty-one, as amended by section two, article thirteen, chapter thirty three, acts of the Legislature, first extraordinary session, one thousand nine hundred thirty-three, be amended and reenacted and that said article thirteen be amended by the addition thereto of sections two-(a) to two-(i), inclusive, to read as follows:

SECTION 2. There is hereby levied and shall be collected annual privilege taxes against the persons, on account of the business and other activities, and in the amounts to be determined by the application of rates against values or gross income as set forth in sections two-(a) to two-(i) inclusive, of this article.

* * * * * * *

SEC. 2-(h). Upon every person engaging or continuing within this state in any service business or calling not otherwise specifically taxed under this act, there is likewise hereby levied and shall be collected a tax equal to one per cent of the gross income of any such business.

SEC. 2-(i). Upon every person engaging or continuing within this state in the business of collecting incomes from the use of real or personal property or of any interest therein, whether by lease, conveyance or otherwise, and whether the return be in the form of rentals, royalties, fees, interest or otherwise, the tax shall be one per cent of the gross income of any such activity: *Provided,* That any person who shall make return of and pay a personal net income tax on the incomes covered by this section two-(i) shall not be required to pay the tax herein imposed upon said incomes.

C.

**The Date of Decree and Application for Appeal.**

The decree sought to be reviewed was entered on the 21st day of May, 1938.

The application for appeal is presented on this the 21st day of May, 1938.

D.

**Nature of Case and Rulings of the Court.**

This is a suit in equity brought in the United States District Court for the Southern District of West Virginia, by United Artists Corporation, a corporation organized and existing under the laws of the State of Delaware, against the defendant, Ernest K. James, individually and in his official capacity as Acting Tax Commissioner for the State of West Virginia (successor to Fred L. Fox, the original defendant), to secure an injunction to restrain the defendant from collecting, by levy or otherwise, in the manner provided by law for such cases, a tax assessed against the plaintiff, in the amount of $4,402.19, under the provisions of the taxing statute of the State of West Virginia, commonly known as the "Business and Occupation Tax", as found in Article 13, Chapter 11, Code of West Virginia, 1931, as amended by Article 13, Chapter 33, Acts of the Legislature of West Virginia, First Extraordinary Session, 1933, and by Chapter 86, Acts of the Legislature of West Virginia, Regular Session, 1935. The gross income of the plaintiff with respect to which said assessment was made and collection of tax sought, was that received by the plaintiff by virtue of certain rental or lease contracts entered into by and between the plaintiff and certain motion picture exhibitors in the State of West Virginia, under which films belonging to the plaintiff were exhibited throughout theaters located in the State of West Virginia, and for which the plaintiff re-

ceived certain sums of money. All of said gross income attempted to be taxed and assessed for taxation arises solely from the leasing or renting of said films to theater owners wholly within said State of West Virginia.

The bill alleged that the defendant had made the assessment against the plaintiff, and threatened the plaintiff that he would attach funds due the plaintiff from the exhibitors of its films, and attach or distrain the plaintiff's films in the possession of such exhibitors and invoke all other civil remedies and criminal penalties provided by statute, unless said tax was paid.

Plaintiff gave notice of application for and sought an interlocutory injunction and insisted thereon, and sought the relief upon the alleged unconstitutionality of the Act, under the Constitution of the United States, as applied to the plaintiff's business involved, because (1) the plaintiff was not nor has never been engaged in doing business within the State of West Virginia within the purview and meaning of said taxing statutes; (2) the business and activities of the plaintiff upon which the taxes sought to be levied are conducted solely in interstate commerce; (3) the provisions of Article 13, Chapter 11 of the Code of West Virginia, as amended, deny to the plaintiff equal protection of the laws and deprive said plaintiff of its property without due process of law, all in contravention of the Fifth and Fourteenth Amendments to the Constitution of the United States.

The defendant resisted the granting of injunctive relief on the grounds that plaintiff was engaged in doing business within the State of West Virginia, and particularly within the purview of the taxing statutes applicable thereto, in that it was collecting incomes from the use of real and personal property, or an interest therein, by lease or rental agreement, and receiving therefor moneys in the form of rentals, royalties and fees, and generally that said plaintiff

was engaging or continuing within said State of West Virginia in a certain business or calling, to-wit, the renting or leasing of its films and collecting rents, profits and fees therefor; that plaintiff in and about its said business was not engaged in interstate commerce, but that upon the delivery in the State of West Virginia of its films, and the breaking of the package in which the same were contained, that interstate commerce ceased, and that the activities of the plaintiff in West Virginia consisted solely of activities carried on in intrastate commerce, in that the exhibiting of said films in the State of West Virginia was independent of, and wholly apart from any interstate transaction, and was purely one disassociated therefrom, and carried on in intrastate commerce, the interstate commerce feature thereof being purely incidental to the local exhibition of said films in West Virginia.

The judge of the District Court convened a court of three judges under Section 266, amended, of the Judicial Code (28 U. S. C. A., Sec. 380).

The court, upon hearing the cause, held that a jurisdictional amount was involved, that the plaintiff had no adequate remedy at law, and that therefore the court was empowered to entertain the application for injunction; that the plaintiff was not engaged within the State of West Virginia in the business of collecting incomes from the use of real or personal property, or interest therein, whether by lease, conveyance or otherwise, and whether the return be in the form of rents, royalties, fees or otherwise; and that the acts of the plaintiff in and about the conduct of its business in West Virginia constituted "interstate commerce" and hence that the State of West Virginia had no power to impose upon and collect from the plaintiff the tax involved, and that the plaintiff was entitled to the relief prayed for, and entered the order from which this

appeal was taken, perpetually enjoining and restraining the defendant from enforcing the state tax against the plaintiff, with respect to the income received from the leasing, renting, and use of its films in West Virginia.

**Cases believed to Sustain Jurisdiction.**

Cases sustaining direct appeal to the Supreme Court of the United States from a special statutory court convened under Section 266, amended, of the Judicial Code, are:

*Fox* v. *Standard Oil Company*, 294 U. S. 87;
*A. Magnano Company* v. *Hamilton*, 292 U. S. 40;
*Stewart Dry Goods Company* v. *Lewis*, 294 U. S. 550;
*Bingaman* v. *Golden Eagle Western Lines*, 297 U. S. 626;
*James* v. *Dravo Contracting Company*, 82 L. Ed. 125.

It is, therefore, respectfully submitted that the Supreme Court of the United States has jurisdiction of the appeal petitioned for in this case.

CLARENCE W. MEADOWS,
*Attorney General of West Virginia;*
W. HOLT WOODDELL,
*Assistant Attorney General;*
FORREST B. POLING,
*Assistant Attorney General,*
*Counsel for Defendant.*

## EXHIBIT "A".

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA, AT CHARLESTON.

No. 3624.

UNITED ARTISTS CORPORATION, a Corporation,

versus

ERNEST K. JAMES, Individually and in His Official Capacity as Acting Tax Commissioner for the State of West Virginia (Successor to Fred L. Fox, the Original Defendant).

Suit by the United Artists Corporation Against Ernest K. James, Acting Tax Commissioner of West Virginia, for an Injunction.

Injunction Awarded.

Before Northcott, Circuit Judge, and McClintic and Harry E. Watkins, District Judges.

E. W. Knight and R. G. Kelly for plaintiff, Clarence W. Meadows, Attorney General of West Virginia, and Forrest B. Poling, Assistant Attorney General for Defendant.

McCLINTIC, *District Judge:*

The Court makes the following findings of fact and conclusions of law;

FINDINGS OF FACT.

There is no dispute as to the facts as they were stipulated. The stipulation shows the following material facts.

The Plaintiff, United Artists Corporation, a corporation, is one created under the laws of the State of Delaware, with its principal office and chief place of business located in the City of New York in the State of New York.

The defendant, Ernest K. James, at the time of the submission of this suit, was the Acting Tax Commissioner

of the State of West Virginia (successor to Fred L. Fox, set out in the bill herein as Tax Commissioner). He is now the duly appointed and qualified Tax Commissioner. He is a citizen and resident of the City of Charleston, Kanawha County, West Virginia, and of the Southern Judicial District of West Virginia, and as such Tax Commissioner is charged with the duty of collecting taxes for the State of West Virginia and administering and enforcing the tax laws of the State of West Virginia.

This is a suit of a civil nature in equity. The controversy involved therein is wholly between citizens of different States, and the amount in controversy therein exceeds three-thousand dollars, exclusive of interest and costs.

The plaintiff is engaged in the business of distributing motion pictures from its place of business in the State of New York to exhibitors of motion pictures in practically every state of the United States, including the State of West Virginia.

The plaintiff has no place of business, office, agents or employees in West Virginia, and owns no property in West Virginia other than such of its films as are temporarily within West Virginia for exhibition purposes.

The plaintiff maintains branch offices in certain cities of the United States, including the Cities of Cincinnati in the State of Ohio, Pittsburgh in the State of Pennsylvania and Washington in the District of Columbia, but no office of any kind is maintained in the State of West Virginia.

The method of doing business between the plaintiff and West Virginia exhibitors is as follows: The plaintiff makes public announcement from time to time of motion pictures that it has or will have for release. Theatre owners or managers who desire to exhibit motion pictures that the plaintiff has or expects to have for distribution make written application in the form of an offer to the plaintiff at its place of business in New York, usually through the representatives of one of the three branches above named, for a certain picture or for a number of certain pictures or for a number of pictures to be selected by the exhibitor.

The plaintiff, through its proper officers or representatives at its main office in the City of New York, rejects or ac-

cepts such application and offer. When such application and offer is accepted a contract is made by executing upon such application and offer an acceptance thereof in the State of New York and returning such contract, composed of the application and offer and such acceptance, to the said exhibitor.

Such contract provides that the motion picture films therein specified or to be selected as therein provided for will at the time or times specified or provided for be sent by the plaintiff to the exhibitor, who is by the contract authorized to exhibit such films for a number of days fixed by the contract, which period of time is usually for one day or for seven days or for some intermediate number of days. The contract provides that the exhibitor will pay the plaintiff for the right to exhibit such films, which payment is sometimes fixed by the contract as a specified sum of money and sometimes as a specified percentage of the receipts from theatre admissions during the day or days when said picture is exhibited. The contract further provides that the exhibitor at the end of such period will ship said film or films by a carrier designated or used by plaintiff, to some other exhibitor, who is usually outside of the State of West Virginia, or to the Cincinnati office of the plaintiff, or to the Pittsburgh or Washington office of the plaintiff, whichever shipped the film to the exhibitor, such shipment in any event to be at the direction of the plaintiff, and such films are always finally returned to the plaintiff in New York or at some point without the State of West Virginia.

Pursuant to said contract the plaintiff sends the films from one of said branch offices without the State of West Virginia by express or parcel post or other carrier to the exhibitor in West Virginia. Such exhibitor then exhibits such films in ordinary motion picture theatres, and charges an admission fee to such of the public as desire to see such exhibition. When the use of the pictures is completed according to the contract they are re-shipped on advices given by the plaintiff. Usually said contracts are sent by the New York office of the plaintiff to its said Cincinnati or Washington, D. C., or Pittsburgh office, and by said office to West Virginia exhibitors. There are a large number of exhibitors of plair-

tiff's films in the cities and towns of West Virginia, such films being exhibited in nearly all the counties in said State. All prints and films of the motion pictures licensed for exhibition by exhibitors in West Virginia are manufactured and made in laboratories in the State of California, and all of such prints and films are sent from California to Cincinnati, Pittsburgh, and Washington and thence to exhibitors in West Virginia. Always the contracts are made in New York, the films are produced and owned outside the State of West Virginia, and the films are shipped from without the State of West Virginia into the State of West Virginia to the exhibitor and are afterwards again shipped out of the State of West Virginia, and payments by the exhibitor are sent to and received by plaintiff without the State.

The plaintiff employs a representative who comes into the State of West Virginia regularly and spends approximately one-half of his employed time in said State encouraging and soliciting various theatre managers or owners therein to exhibit the plaintiff's films, and in doing so, it is the custom and practice of said representative to exhibit to said theatre managers or owners the public announcements of the motion pictures the plaintiff has or will have for release and distribution, and to procure the signatures of said theatre managers or owners to written applications in the form or offers to the plaintiff at its place of business in New York.

The plaintiff does not designate and has never designated exhibitors in West Virginia to act as its agents for the purpose of shipping films to other exhibitors in West Virginia. On two occasions in the year 1936 it requested an exhibitor to forward a film to another exhibitor within the state, which other exhibitor then returned the film in each instance to the plaintiff without the state.

On all other occasions in 1936 films were returned by exhibitors directly to the plaintiff without the state. During the year 1936 the plaintiff made a total of fifteen hundred and forty-six shipments of films into West Virginia, to one-hundred and forty-four theatres, all of which shipments were returned to the plaintiff without the state.

The plaintiff did not, in 1936 or any other year, permit any exhibitor to exhibit a picture for a longer time than the

period specified in a contract, unless such exhibitor made a formal request for such privilege and unless such request was officially approved in New York and unless the exhibitor paid additional compensation for such additional time.

During the year 1936 the plaintiff caused the admissions to theatres in the State of West Virginia to be checked on eight separate occasions, which checks were made for the purpose of ascertaining the receipts from theatre admissions during the day or days when the pictures of the plaintiff were being exhibited therein, in order to arrive at the correct amount due to the plaintiff from the exhibitor on a percentage basis for the privilege of exhibiting plaintiff's pictures by said exhibitor. These checks were all made by an independent contractor under an arrangement between the plaintiff and the exhibitor.

By Article 13 of Chapter 11 of the West Virginia Code of 1932, as amended and in effect from March 9, 1935, such Article dealing with the Business and Occupation Tax of West Virginia, it is provided that (Section 2-(h)) a tax equal to one percent of gross income is levied upon and shall be collected from every person engaging or continuing within the State in any service business or calling not otherwise specifically taxed under said law; that (Section 2-(i)) upon every person engaging or continuing within the State of West Virginia in the business of collecting incomes from the use of real or personal property or of any interest therein, whether by lease, conveyance, or otherwise, and whether the return be in the form of rentals, royalties, fees, interest, or otherwise, the tax shall be one percent of the gross income of any such activity; that (Section 4) taxes levied under said Article 13 shall be payable in quarterly installments on or before the expiration of thirty days from the end of the quarter in which they accrue, and the taxpayer shall within thirty days from the expiration of each quarter make out an estimate of the tax for which he is liable for such quarter, verify the same by oath and mail the same, together with a remittance in the form required, to the office of the defendant; that (Section 5) on or before thirty days after the end of the tax year each person liable for the payment of any such tax shall make a return showing the gross

proceeds of sales or gross income of business, compute the amount of tax chargeable against him in accordance with the provisions of said Article, deduct the amount of quarterly payments, if any, and transmit with his report a remittance in the required form covering the residue of the tax chargeable against him to the defendant.

Such article further provides that (Section 7) if any person fail or refuse to make return, or if the Tax Commissioner has reasonable ground to believe that any return made is so deficient as not to form the basis of a satisfactory assessment of tax, the Tax Commissioner may proceed as he deems best to obtain information on which to base the assessment of the tax, shall assess the tax and notify the person assessed of the amount of the tax; and the assessment of the tax by the Tax Commissioner shall be final as to any person who refused to make a return.

Such Article further provides that (Section 8) any person, having made the return and paid the tax as provided therein, who feels aggrieved by the assessment made upon him, may apply to the Board of Public Works within thirty days after notice is mailed to him by the Tax Commissioner for a hearing and correction of the amount of the tax so assessed against him, said Board may grant or deny such hearing, and upon a hearing, if granted, may make such order as shall appear to it just and lawful; any person improperly charged with any tax and required to pay the same may recover the amount paid, together with interest, in any proper action or suit against the Tax Commissioner, and the Circuit Court of the County in which the taxpayer resides or is located shall have original jurisdiction of any such action and shall adjudge costs to such extent and in such manner as may be deemed equitable, and upon presentation of a certified copy of a judgment in any such action the Auditor of the State of West Virginia shall issue his warrant upon any funds in the State Treasury available for the payment thereof; no injunction shall be awarded to restrain the collection of taxes imposed thereby except upon the ground that the assessment thereof was in violation of the Constitution of the United States or the Constitution of the State of West Virginia, or that the same

were fraudulently assessed, or that there was a mistake made in the amount of taxes assessed upon such person, and in the latter case the bill must show an application to the Board of Public Works for the correction of the assessment and the payment into the treasury of all taxes appearing by the bill of complaint to be owing.

Such Article further provides that (Section 9) the assessment of taxes and the returns required shall be for the year ending on the 31st day of December; that (Section 11) all remittances of taxes imposed thereby shall be made to the Tax Commissioner and he shall pay the moneys into the state treasury to be kept and accounted for as provided by law; that (Section 12) a tax due and unpaid thereunder shall be a debt due the State and a lien upon the property used in the business or occupation upon which it is imposed, such lien shall have the same priority as the lien of the general property tax, a penalty of five per cent shall be added for any default for thirty days or less, and for each succeeding thirty days of such default there shall be added an additional penalty of one per cent; that (Section 13) the Tax Commissioner may collect taxes due and unpaid thereunder, together with all accrued penalties, by an action in assumpsit, motion for judgment, or other appropriate proceedings in the Circuit Court of the County in which the privilege taxed has been exercised; and in the event of default in payment of the tax for sixty days after the same shall be due the Tax Commissioner may proceed in the Circuit Court of the County in which the privilege taxed has been exercised to obtain an injunction restraining the further exercise of the privilege until full payment of all taxes and penalties due under said Article; that (Section 20) the Tax Commissioner may distrain upon any goods, chattels, or intangibles of any taxpayer delinquent under said Article for the amount of all taxes and penalties accrued and unpaid thereunder, and he is authorized to require the assistance of the sheriff of any county of the state in levying such distress in the county of which such sheriff is an officer.

Such Article further provides that (Section 21) it shall be unlawful, under penalty of a fine not exceeding one-

thousand dollars and imprisonment not exceeding one year, for any person to refuse to make the return provided for therein, or make any false or fraudulent return or false statement in any return with intent to defraud the state or to evade the payment of the tax or any part thereof imposed thereby, or for any person to aid or abet another in any attempt to evade the payment of such tax, or for an officer of any corporation to make or permit to be made for any corporation any false return or false statement in any return required thereby, with intent to evade the payment of any tax thereunder.

Chapter 1 of the Acts of the Extraordinary Session of the Legislature of West Virginia, effective July 1st, 1925, imposed (Section 2-(g)) a tax of three-tenths of one per cent of the gross income of any business not included in businesses enumerated in the statute, and this provision became Section 2-(g) of said Article 13 of Chapter 11 of the West Virginia Code of 1932, and pursuant to amendment made by Chapter 33 of the Acts of the Legislature of 1933, effective May 26, 1933, the substance of said provision became Section 2-(h) of said Article 13 as now in effect, with an increase of the tax imposed to one per cent of the gross income of any such business. And under each such statute or provisions of the Code an assessment of tax by the Tax Commissioner was final as to any person who had failed or refused to make a return for the purposes of the tax.

The plaintiff, under its view of the case, has never made any of the estimates, reports or returns required by the Code of West Virginia, as amended and now in effect, or by any previous statute to be made by persons engaged in business in West Virginia.

The defendant, under its view of the case, made an assessment of the tax against the plaintiff, as of October 1st, 1936, of the sum of four-thousand and two dollars and nineteen cents, and demanded the payment of such sum as a tax under the statute, and claims that the plaintiff should pay such tax upon all such sums as it may receive in West Virginia from exhibitors of its films after October 1st, 1936.

The defendant has threatened and now threatens to un-

dertake to enforce the collection of the amount of the tax assessed by him, with all accrued penalties and those to accrue, and for the purpose to bring against the plaintiff actions at law in the counties, or some of them, in which plaintiff's films have been and from time to time are being shown, and in such actions to sue out attachments and to make the exhibitors of plaintiff's films garnishees thereunder, and to distrain plaintiff's films in the possession from time to time of exhibitors in the State of West Virginia, and further threatened that if plaintiff shall refuse for sixty days to pay the amount of the tax assessed, to institute suits in chancery in the courts of the counties of West Virginia in which the plaintiff's films have been and from time to time are being shown, for an injunction to restrain the further showing of such films until full payment shall be made of all the taxes and penalties claimed by the defendant to be due.

The defendant also threatens to repeat and continue such suits and attachments until he has collected all such taxes and penalties, and also threatens to harass and annoy the exhibitors by the service of notices of garnishment upon them, by seizing under distraint films in their hands from time to time, and by enjoining the showing of plaintiff's films by such exhibitors until the plaintiff has paid the taxes so assessed.

## Conclusions of Law.

The Court concludes that there is involved in this suit the necessary amount to give the District Court of the United States for the Southern District of West Virginia jurisdiction of the cause; that the plaintiff has no adequate remedy at law, and that a court of equity has jurisdiction of the issue; that the plaintiff never has been and is not now engaged within the State of West Virginia in the business of collecting incomes from the use of real or personal property or interest therein, whether by lease, conveyance or otherwise, and whether the return be in the form of rents, royalties, fees, interest or otherwise; and that the acts of the plaintiff hereinbefore set out constitute "interstate commerce."

OPINION.

This is a suit in equity brought by the plaintiff seeking to restrain the collection of certain taxes sought to be imposed by the State of West Virginia. A District Court of three Judges, organized in accordance with Section 266 of the Judicial Code, as amended (28 U. S. C. A., Sec. 380) heard the case on plaintiff's application for interlocutory and permanent relief.

At the hearing no evidence was taken, the cause being submitted on the stipulation of facts. It was agreed that the hearing should be final.

The tax sought to be imposed upon the plaintiff is a tax of one per cent of the gross income received by the plaintiff from the exhibitors of its films in the State of West Virginia.

In the case of *Paramount Pictures Distributing Company et al.* v. *Henneford et al.*, 184 Wash. 376, 51 Pac. (2) 385, (writ of certiorari denied by Supreme Court, 298 U. S. 665) the court, in reference to the exact same sort of tax, under a similar statute and between a film company and a Tax Commissioner, said:

> "* * * The tax provided for in the statute is an excise tax, and not a property tax. It is based upon a percentage of the gross income of a particular business. State ex rel. Stiner *v.* Yelle, 174 Wash. 402, 25 P. (2d) 91; Supply Laundry Co. *v.* Jenner, 178 Wash. 72, 34 P. (2d) 353. It being an excise tax for the purpose of raising revenue, the act of the legislature imposing it was not passed in the exercise of the police power. Whether a law is enacted in the exercise of that power depends upon whether the primary purpose is to raise revenue or to regulate industry. If the primary purpose is regulation, it is enacted under the police power, even though it may be called a license or tax. Fox Film Corporation *v.* Trumbull, 7 Fed. (2d) 715; Cooley on Taxation (3d ed.) vol. 2, p. 1127. As already indicated, chapter 191 of the laws of 1933 and the amendatory acts thereto were plainly enacted for the primary purpose of collecting revenue, and not for the purpose of regulating industry. Cases cited, which hold that the

state legislature, in the exercise of the police power, may regulate to some extent a business which is interstate in character, have no application to this case.

Inquiry will now be directed as to whether the business done by the local exchange, in the manner above indicated, is a part of interstate commerce. This presents a federal question, and is controlled by the case of Binderup *v.* Pathe Exchange, 263 U. S. 291. In that case New York manufacturers and distributors of motion picture films, in the regular course of their business, shipped the films from the state of New York to the state of Nebraska, and delivered them to a Nebraska resident, through a local agent of the manufacturers in that state, and it was there held that the business of the manufacturers and producers of the films and their transactions with the exhibitors were interstate commerce, notwithstanding that in accordance with the contracts the films were delivered through a local exchange in Nebraska through which they were first consigned and transported."

The opinion in this case then quotes at length from the Binderup case, which was held as binding upon it so far as the doctrine of interstate commerce is concerned.

We agree with this holding.

The defendant attempts to draw a distinction between anti-trust cases and tax cases, claiming that while the former may be interstate commerce, the latter is not necessarily so. No real authority is cited for this claim, and under all the authorities to the contrary and the facts here, we are unable to agree with this alleged distinction.

The contention of the defendant that the plaintiff had an adequate administrative remedy is, in our opinion, not tenable. The law quoted heretofore gives the right to pay the tax and sue the Tax Commissioner for its recovery. This remedy, if it can be called such, would be judicial and a Federal Court would have jurisdiction when the other essentials thereof are present.

The defendant further contends that the plaintiff lost any right, when it did not make a return and pay the assessed tax.

If the tax was unlawful, then the plaintiff was not required to pay it and go into a State Court for its recovery (when it has a right to resort to a Federal Court) and if judgment for the recovery of the tax is obtained, to then wait until a legislature, of its own free will, sees fit to appropriate money for the refund.

The Tax Commissioner was required to pay any money collected into the State Treasury immediately upon its receipt, and only the act of an independent legislature, which meets every two years for a constitutional period of sixty days, can take it out.

Since writing the foregoing Opinion the Supreme Court of West Virginia, in the case of the Charleston National Bank et al. *v.* Fred L. Fox, has had before it for consideration whether Chapter 87 of the Acts of the Legislature, Regular Session, 1935, providing for the refund of taxes collected and improperly required to be paid by the State Tax Commissioner, had been validly passed by the Legislature.

The Court decided in an opinion filed Nov. 23rd, 1937, that it had not been validly enacted and was of no effect. As we see it, this only strengthens our conclusion above.

ELLIOTT NORTHCOTT,
*Circuit Judge.*
GEORGE W. MCCLINTIC,
*District Judge.*
HARRY E. WATKINS,
*District Judge.*